No. 268

FILED
FEB 23 192
WM. R. STANS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. ————.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

EDITH F. COOGAN, as Special Administratrix of the Estate of WILLIAM COOGAN, Deceased,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LYLE PETTIJOHN,
427 Metropolitan Bank Bldg.,
St. Paul, Minnesota,
Attorney for Respondent.

T. D. SHEEHAN,
H. J. GOODWIN,
427 Metropolitan Bank Bldg.,
St. Paul, Minnesota,
of Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

EDITH F. COOGAN, as Special Administratrix of the Estate of WILLIAM COOGAN, Deceased,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The respondent as special administratrix of William Coogan, deceased, brought this action in the District Court of Dakota County, Minnesota, in behalf of herself and her six minor children, to recover for the wrongful death of William Coogan, the husband and father.

The respondent had a verdict in the trial court for thirteen thousand five hundred ($13,500.00) dollars. The petitioner then moved for judgment non obstante, which was denied.

The petitioner then appealed from the judgment to the Supreme Cout of the State of Minnesota, where the judgment of the lower court was affirmed, and judgment entered in the Supreme Court of the State of Minnesota, on the 13th day of November, 1924, in respondent's favor, and against the petitioner in the sum of Fourteen Thousand Three Hundred Sixty-three and 29-100 ($14,363.29) Dollars.

STATEMENT OF FACTS.

William Coogan, the deceased husband of respondent, had been in the employ of the defendant over fourteen (14) years. On the 14th day of July, 1923, he came to his death while employed as a railway brakeman on what is known as defendant's freight train 92. The run of this train was from Farmington to Austin, Minnesota. Train 92 was an Interstate train, and at the time that Coogan was killed, was engaged in Interstate commerce.

Train 92 was made up in the yards at Farmington, Minnesota, a little after 7 o'clock A. M. on the day in question by what was known as the switch crew, of which John Marshall was conductor, and Dubke and Odekirk were brakemen. (Record page 23, Folios 67-69.)

The first movement in making up of train 92 was to kick the caboose belonging to this train back and east on what is known as track 1. The tracks at that place run in an easterly and westerly direction. Coogan rode the caboose in on track

t, and stopped it by applying the hand brakes. (Record page 23, Folio 69, page 59, Folios 175 and 176.)

The next movement in the making up of this train was for the switch engine to couple onto two cars, bring them to the lead track, and while in motion, cut them off from the engine and kick them down on track 1. Dubke rode those cars in as they were moving back in an easterly direction toward the caboose on track 1, riding the front car, and controlling their movement by hand brakes, allowing them to couple to the caboose (Record page 24, Folios 70 and 72, page 39, Folio 118, pages 59 and 60, Folio 177.)

The next movement in the making up of the train was for the switch engine to couple onto nine or possibly ten cars, taking them to the lead, cutting them off from the engine and kicking them back on track 1, in the same manner as the former cut, Dubke riding them in, allowing them to couple to the first cut. (Record page 60, Folios 178, 179.)

The next movement in the making up of this train, the switch engine coupled onto either three or four cars, and moved with the cars back onto track 1 with the engine attached, until they coupled onto the cars last put in. This was the final cut, and constituted the entire train. (Record pages 60 and 61, Folios 180 and 181.)

After this last cut of three or four cars had been coupled to the train, and the engine had stopped to see if the automatic coupling had made, they found it necessary to move the entire train back

in order to clear the switch, and they moved the entire string of cars, or train backward in an easterly direction in the neighborhood of two car lengths. (Record page 61, Folio 181.)

They then uncoupled the switch engine from the train, and the road engine was immediately coupled thereto, and when the air hose was connected between the engine and the first car, the engineer attempted to pump up the air train line but was unable to do so for the reason that the air coupling had not been made between the last, and second cut of ten cars put in the train. This air coupling was then made by Dubke, and when made it was found that air was escaping at the rear end of the train, the air hose not having been coupled between the caboose and the car attached thereto. Dubke then started back to the rear end of the train, and when some distance back, discovered the body of Mr. Coogan. (Record pages 62 and 63.)

It also appears that it was the duty of Coogan to couple the air on this freight train, and that with the exception of the coupling between the caboose and the next car, the couplings had all been made prior to the accident. (Record page 17, Folio 50, page 45, Folio 134, page 74, Folio 221.)

Coogan's body was found near the west end of the second car from the caboose. His body was lying parallel with the tracks, outside the south rail, and on or just at the end of the ties. (Record page 17, Folio 57, page 32, Folio 94, page 64, Folio 191.)

The kicked-up condition of the ground, and the blood found just outside of the south rail of track 1, indicated that Coogan's body had been dragged a distance of at least ten to fifteen feet. (Record page 67, Folio 200.)

The rear wheel on the south side of the car coupled to the caboose had blood on it. There was no blood found on any other part of the train. (Record page 19, Folio 56, page 33, Folios 97, 98.)

A piece of Coogan's clothing was found on the bolt passing through the journal box holding the anchor bar on the journal box of the rear wheel of the car coupled to the caboose, being the same wheel on which blood was found. (Record pages 34, 35, 55 and 64.)

Coogan's hat, his false teeth, part of his tongue, and flesh from his face, was found between the rails of the track, some of them close to the south rail about fifteen feet west of where his body was found. (Record pages 35, 47, 48.)

The entire lower part of his face was gone. His left leg and left arm were badly mashed, so that the undertaker had to put casts on them. The little finger of his left hand was crushed. (Record page 36, Folio 106, page 4, Folio 144, page 55, Folio 165.)

Immediately south of the south rail of track 1 there was an air pipe line on top of the ties, and extended along the track for a distance, perhaps, of eight hundred to a thousand feet. This air pipe line when in normal condition was fastened to the ties by clamps or spikes about twelve inches out

from the south rail of the track, and close to the ties, leaving no space between the pipe line and the ties to which it was fastened. This air pipe line at a point about fifteen feet west of where the body was found, was in a defective condition. That for a distance of at least fifteen feet, the fastenings had been torn loose, and the air pipe line bent inward and up from the ties, leaving a space of about three and one-half to four inches between the ties and the air pipe line, and bent in toward the rail possibly three or four inches. That the pipe line at this place had been in this condition for possibly four or five months prior to the accident. (Record pages 70, 71, 72 and 73.)

Defendant's Exhibit "G," a picture of the front end of the rear truck of car three was taken for the purpose of showing where the hat was found, estimated to be about fifteen feet west of the body. (Record pages 129, 130.)

It was also shown that a man stepping in between the cars from the south side to couple the air on the train standing as this train was, that the natural position for him to take would be to step inside the south rail with his right foot, leaving his left foot immediately outside the rail, but inside of the pipe line. (Record pages 73, 74.)

There was introduced in evidence the shoe worn by the deceased at the time of the accident, showing a very marked rounding depression on the counter of the left shoe on the outside of the shoe running parallel with the sole of the shoe, and

just above the heel. That the shoes were in the same condition at the time taken from the body of the deceased as when offered in evidence, except that the depression in the counter of the shoe was not so marked to the eye at the time of trial. The outside leather covering the counter of the shoe having appeared to have ironed itself out to some extent. (Record pages 50, 51, 52, 53 and 94.)

The standard gauge of the railroad track is four feet eight and one-half inches, and the width of the box cars such as used on this train nine feet. The length of box cars thirty-three to forty feet. (Record pages 69 and 70.)

POINTS AND AUTHORITIES.

What *facts* were established by the evidence in this case were for the jury. It is equally true that if the *inference* to be drawn from the facts proven are not certain and conclusive, then the *inferences* proper to be drawn from such facts are for the jury.

This rule is well expressed by the late Justice Mitchell in a case that has frequently been cited by the Courts of Minnesota, in this class of cases. In Abbette v. Milwaukee, 30 Minn. 482:

> "Negligence is ordinarily a question for the jury. It is always so, where the evidence on a material point is conflicting, or where the facts being undisputed different minds might reasonably draw different conclusions from them. Negligence cannot be conclusively established as a matter of law upon a state of facts on which fair minded men of ordinary intelligence may differ as to the inferences to be drawn; and when the question of negligence arises upon even a conceded state of facts from which reasonable minded men might arrive at different conclusions, it must be submitted to the jury, and if the *inferences* to be drawn from the evidence are not *certain* or *incontrovertible* the question of negligence cannot be passed upon by the Court. The evidential facts may be all admitted, and yet the question of negligence not be a question for the Court; for in such case this is the *main fact*. The existence or nonexistence of which is to be inferred from the *other facts*." (Italics in all cases ours.)

See also N. P. Ry Co. vs. Egeland, 163 U. S. 93.
Texas & Pac. Ry. Co. vs. Gentry, 163 U. S. 353.
Sioux City & P. Ry. vs. Stout, 17 Wall. 657.

This case was tried upon, and it is the theory of respondent, that after the last cut of three cars were coupled onto the train with the switch engine attached, and stopped to see if the automatic coupling was properly made, Coogan already having made all the other air couplings then stepped in between the caboose and the rear car to make the last air coupling, with his right foot inside the rail and his left foot outside the rail between the south rail and the air pipe line on the ties, and when in stooping position his left foot slipped backward, and under the air pipe line, and before having had time to couple the air, the cars started backward in the movement being made to shove them into clear, and when he attempted to straighten up he found his foot caught and could not free his foot from beneath the air pipe line, and he was forced backward by the cars, and fell to the ground outside the south rail, receiving the injuries causing his death. The above in substance is what the jury must have found by its verdict.

While it is not necessary for defendant to show the manner in which the accident happened we call attention to the fact that there is not a suggestion or intimation in the evidence, or a fact disclosed by the evidence from which it could possibly be inferred that the accident could

have happened in any manner other than the one contended for by the respondent.

The evidence in this case furnishes a reasonable basis for the finding, that at the time of the accident Coogan was between the caboose and the car coupled thereto, in an attempt to couple the air at that point. The air on this train, except the last cut of three cars had all been coupled before the accident, with the exception of that between the caboose and car coupled thereto. The air coupling between the second and third cars from the caboose, and such other air couplings as were necessary to be made in other places in this string of cars were made by Coogan during the time this train was being made up. Delhanty, the other brakeman of the road crew, was in the west end of the yard, and Jeffers, the conductor, was also in the west end of the yard. Coogan was the rear brakeman, so the other members of the road crew had nothing to do with this air coupling that had been made. It was Coogan's duty to couple the air. This fact was not disputed in the trial court or the supreme court of the State, and is suggested for the first time by the petitioner in his brief in this Court, basing it upon the answer of Dubke when speaking about the coupling made by him after the road engine had been put on, when referring to the coupling made between the last cut of three cars and the former cut of ten. That Coogan was engaged in an attempt to make this last coupling between the caboose and the first car there can be no question. That he was at the open-

ing between the caboose and the car coupled thereto is shown conclusively by the blood on the rear wheel of this car coupled to the caboose, and by parts of his clothing being found on the bolt through the oil box of the journal of the same wheel. There was no blood on any other part of the train. It being his duty to make this coupling, and the fact that he had made all the other couplings of the air with the exception hereinbefore referred to, and it being shown that he was at this point, it is a fair conclusion that he was engaged in the performance of his duty.

The evidence furnished a reasonable basis for the jury to find that the natural position for Coogan to take in making this coupling was with his right foot inside the rail, and his left foot outside, and inside the air pipe line, and that just before the train started moving backward to put the cars into clear, and while in a stooping position, his left foot slipped beneath the air pipe line and became caught. Mr. Odekirk, who had years of experience in that line of work testified that this would be the natural position for him to take, so that he would be facing the engine. That it is customary for men, when working around trains of that kind to work facing the engine. The petitioner and defendant called Mr. Lieb, Mr. Palmer and a Mr. Hemsey, who had never had any experience whatever in coupling air hose, and they testified to the effect that the natural position for a brakeman to take in attempting such a coupling would to to step in with his left foot inside the

rail. The jury were justified in believing the man who had years of experience in doing that work.

The evidence also furnished a reasonable basis for the jury to find that the opening between the caboose and the car coupled thereto, before they started to shove the train into clear was opposite the defective condition in the air pipe line when Coogan stepped in to make the air coupling, and while in a stooping position his left foot became caught, slipping back under the air pipe where there was a space of between three and one-half and four inches between the pipe and the ties so that the cars in starting backward forced him to the ground outside the rail and inside the pipe line causing the injuries resulting in his death. The blood on the rear wheel of the car coupled to the caboose, and a part of his clothing on the bolt through the journal of the same wheel showing conclusively that Coogan was at this opening between the caboose and car. His body was found approximately at the west end, or front end of the second car from the caboose. The blood and kicked-up condition of the ground outside the south rail showed that his body had been dragged a distance of at least fifteen feet. His hat was found in the neighborhood of fifteen feet west of the body, and beneath the rear trucks of the third car from the caboose. His teeth, tongue and pieces of flesh nearby, just inside the south rail. *The defective condition of the air pipe line was about fifteen feet west of the body, conclusively showing that the opening between the caboose and the first*

car were opposite the defective condition in the air pipe line when they started to shove the train into clear. Then take into consideration that after Coogan had been forced to the ground outside the south rail, he might have been carried a short distance without any evidence of dragging, and before the wheel caught his left leg. The mark or more properly speaking the rounding depression in the counter of his left shoe on the outside of his shoe, and running parallel with the sole of his shoe is convincing if not conclusive evidence of how he was caught. In this connection we wish to note that the undertaker testified that when he delivered Coogan's shoes to one of the attorneys for the respondent, his attention was called to the mark or rounding depression in the counter of the left shoe, also in effect that he noticed no difference in the condition of the shoe, at that time from what they were when removed from the body. The nature of Coogan's injuries themselves are strongly corroborative of the manner in which he was caught and of the position he was in when the injuries occurred. It does not appear that the right side of his body was injured at all to speak of. He could not have freed his left foot from beneath the air pipe line until he was forced back by the cars so that his body became practically parallel with the pipe line, and close to the ground. This would practically force his body in the space between the air pipe line and the rail with the knee part of his left leg over the south rail in a

bent position. The undertaker testified his left leg was so badly mashed, as he expressed it, that he had to put a cast on it. The wheel would next reach his left arm. His arm was also caught by the wheel, and so badly mashed that a cast had to be placed upon it. The little finger on the left hand was mashed and crushed by the wheel. The lower part of his face was mashed and gone, leaving part of his tongue, false teeth and flesh just inside the south rail. The bolt through the journal caught some part of his clothing and dragged his body for a distance of practically fifteen feet, when the body became detached from the cars in their backward movement. The cars finally stopping about two car lengths east of the body.

AUTHORITIES.

In this line of cases the rule is:

> "That it is not necessary in any action, civil or criminal, that the material facts should be established by direct evidence."
>
> "If the circumstantial evidence in any case furnishes a *reasonable basis* for the inference by the jury of the ultimate fact, that the alleged negligence was the cause of the injury complained of it is sufficient proof of causal connection to support the verdict."

Lillistrom vs. N. P. Ry. Co., 53 Minn. 464.

Olson vs. G. N. Ry., 68 Minn. 155.

Moores vs. N. P. Ry., 108 Minn. 100.

Murphy vs. Twin City Taxi Co., 122 Minn. 363.

Denerce vs. Soo Ry., 122 Minn. 171.

Mitton vs. Craghill Co., 124 Minn. 165.

Crandall vs. G. N. Ry., 127 Minn. 498.

Diebel vs. Walpert-Droms, 129 Minn. 177.

Fitzgerald vs. Armour & Co., 129 Minn. 81.

Outzelt vs. C. B. & Q. Ry., 150 Minn. 398.

Ardell vs. G. N. Ry., 189 N. W. Rept. 939.

Dushaw vs. G. N. Ry., 195 N. W. Rept. 893.

McIntosh vs. G. N. Ry., 151 Minn. 527.

See also

Chostaw, Okl. and G. Ry. Co. vs. McDade, 191 U. S. 64.

Myers vs. Pittsburg Coal Co., 233 U. S. 184.

Union Pac. Ry. Co. vs. Huxell, 245 U. S. 535.

Gray vs. Davis Dir. Genl., 294 Fed. 58.

Taber vs. Davis Dir. Genl., 280 Fed. 612.

Sioux City R. R. Co. vs. Stout 17 Wall. 657.

In the case of Moores vs. N. P. Ry., Supra, the Court said:

> "Theorize as we may on the subject of proximate cause, it is in its last analysis a question of good common sense to be solved by a practical consideration of the evidence in each particular case. If the evidence in any case leaves the question whether the negligence of the defendant was the cause of the injury a matter of conjecture the defendant is entitled to a directed verdict. The plaintiff, however, is not required to prove the causal connection between the negligence and the injury by direct evidence but the evidence must be something more than consistent with the plaintiff's theory of how the accident occurred. If the circumstantial evidence in any case furnishes a reasonable basis for the *inference* by the jury of the ultimate fact, that the alleged negligence was the cause of the injury complained of it is sufficient proof of causal connection to support the verdict."

Dushaw vs. G. N., Supra, the Court said:

> "Of course, the jury were not at liberty to conjecture how the accident happened. Plaintiff must show causal connection between the negligence alleged, and the injuries suffered. But plaintiff was not required to establish by direct evidence. If the circumstances furnished a basis not only for the inference that the accident may have happened as alleged, but also for the inference that it did so happen, and the Court is of the opinion that it did, the verdict would not rest on mere conjecture."

In the case of Union Pac. Ry. Co. vs. Huxoll, Supra, this court said:

> "The oral argument of plaintiff in error was practically confined to the proposition that the trial court committed reversible error in submitting the question to the jury for the reason that even if it be assumed that the power brake was not in order, there was no substantial evidence in the case, that this failure contributed in whole or in part to cause the death of Huxoll."
>
> "Demonstration is not required in such a case as we have here, but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence."

Counsel for petitioner on page 17 of their brief cite, Pittsburg Coal Co. vs. Myers, 203 Fed 221, in support of their contention that the evidence in this case leaves the cause of Coogan's death speculative and conjectural. That is the only Federal case cited by them, where its facts, if its law, were sound, would entitle it to consideration in this case. That case, however, on appeal was reversed by this Court.

Myers vs. Pittsburg Coal Co., 233 U. S. 184. In reversing the Circuit Court of Appeals, after quoting from the opinion of the Circuit Court quite extensively, Justice Day speaking for this Court said:

> "This question however, was submitted to the jury and found against the defendant in

the trial court. Unless the testimony was such that no recovery can be had upon the facts shown, *in any view which can be properly taken of them*, the verdict and judgment of the District Court must be affirmed.

"That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law, that there was no evidence to show that Myers came to his death by negligence of the defendant in one or more ways charged in the petition; *considering the testimony as it must be considered* in determining questions of this character in Appellate Court, *in the most favorable aspect to plaintiff below* we think the jury might well have found in view of the place where body of Myers was found near the wire, with his cap gone from his head, that he came in contact with the wire, and was thrown to the ground, and that he survived from the contact with the wire, carrying the voltage which it did, and while in this position was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry, or in the motor car."

"We think reasonable men considering the testimony adduced might well have come to this conclusion, and that it was error in the Appellate Court to set aside the verdict for the entire absence of testimony upon this subject. In our opinion the trial court properly left the question to the jury upon testimony which, when fairly considered might sustain the verdict."

Counsel for petitioner cites Patton vs. Texas & P. Ry. Co., 179 U. S. 658, and Looney, Admx., etc. vs. Metropolitan Railroad Co., 200 U. S. 480, as the leading cases in support of its contention. Neither one of these cases are in point. In the Patton case the Court after stating the distinction in the rule between passenger and employe, also stated that the fact of an accident carried with it no presumption of negligence, and further stated that where the testimony shows the cause of an accident uncertain, and shows that any one of half a dozen things may have brought about the injury for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess which of the causes produced the accident, but qualifies that by saying, "where there is no satisfactory foundation in the testimony for that conclusion." In the Patton case there was no evidence tending to point to one of the causes for which the master would be responsible to the exclusion of any other.

In the Looney case, Looney was killed while in removing what was called a plow from beneath the street car, which was used through a slot in the track to connect with the underground current, when used over the Metropolitan system, and to replace the plow when removed with "wires od leads" to connect with the overhead, or trolley system, when the car was being operated over the Great Falls system. The evidence was conclusive in that case that the plow had been removed, and that Looney was engaged in attaching the wires or

leads beneath the car at the time he was killed. This Court said in substance:

> Granting therefore, the conductor was negligent, one of two things was necessary to cause the accident; first, a leak in the insulation, or, second, the deceased touching the uninsulated ends of the leads. For the first the company would be liable, for the second, not.

The ends of the leads had to be uninsulated, and there was no evidence of any defect in the leads or any leak in the insulation, or that leaks were likely to occur, or the amount or degree of inspection necessary to discover them, or failure of inspection. It seems the case was tried and argued in this Court on the theory that Looney was killed while removing plow, but that the evidence was positive to the contrary, that he was killed after the plow had been removed, and while attaching the wires or leads.

DECEDENT DID NOT ASSUME THE RISK AS A MATTER OF LAW.

The air pipe line in this yard extended along track No. 1 outside the rail for perhaps 800 to 1,000 feet. It was an inch and three-quarter pipe. It was fastened to the top of the ties by clamps or spikes about twelve inches out from the south rail, and when in normal condition, leaving no space between the ties and the pipe.

The evidence shows and it was admitted by defendant's witnesses that there is space of at least fifteen feet in this air pipe line, which had been in

a defective condition for over possibly four or five months, clamps and spikes torn away. The pipe bent in at least three or four inches, and up, leaving a space of three and one-half or four inches between the ties and the pipe line.

Coogan had been on this run on Train 91 from Austin to Farmington and on Train 92 from Farmington to Austin some two or three months before the accident. It does not appear from the evidence that Train 91 was ever put away on track 1. Train 92 was sometimes made up on the main track, which is the first track north of track 1, sometimes made up on track 1, sometimes on track 2, and sometimes on track 3, but there is no evidence as to how many times it had been made up on track 1, or that Coogan had ever had occasion to couple air in the immediate vicinity of the defect in the pipe line.

It would be going far to say that even if Coogan knew or should have known of this defect in the pipe line, that he should, as a matter of fact have appreciated the risk and danger of his foot slipping under the pipe, and being caught in the manner he was.

Chicago, R. I. & Pacific Ry Co. vs. Brown, 229 U. S. 317.

Tex. & Pac. Ry. Co. vs. Harvey, 228 U. S. 319.

Tex. & Pac. Ry. Co. vs. Swearingen, 196 U. S. 57.

Gila Valley R. Co. vs. Hall, 232 U. S. 94.

The case of Southern Pac. Co. vs. Berkshire, 254 U. S. 415, cited by the petitioner is not in point or authority under the facts of this case, this Court having expressly stated in its opinion in the Berkshire case that it was confining itself, "*to the case of postal cranes.*"

RULE IN THE "KING" CASE.

In the instant case there is no question of the interpretation of any Federal Act, or the definition of legal principles in its application. No point is made or could be made as to any instruction given by the trial court. The only questions presented are, first, was there any evidence with the proper and legitimate inferences to be drawn therefrom which furnished a reasonable basis for the finding of causal connection between the defendant's admitted negligence and Coogan's death. And, second: Incidently the question of the assumption of risk.

This case comes within the rule announced by this Court in:

Chicago June. Ry. Co. vs. King, 222 U. S. 222.

and followed in:

Chicago, R. I. & Pac. Ry. Co. vs. Brown, 229 U. S. 317.

G. N. Ry. Co. vs. Knapp, 240 U. S. 464.

Seaboard Air Line Ry. Co. vs. Padgett, 236 U. S. 668.

Southern Ry. Co. vs. Gadd, 233 U. S. 572.

Baltimore & Pac. Ry. Co. vs. Whitacre, 240 U. S. 169.

Seaboard Air Line Co. vs. Kenney, 36 Sup. Ct. Rep. 458.

Lewisville & N. Ry. Co. vs. Stewart, 36 Sup. Ct. Rep. 586.

In the case of Chicago June. Ry. Co. vs. King, Supra, this Court said:

> "That although we have jurisdiction to review because the cause of action as stated in the pleadings rested upon the safety appliance law, the questions now presented are of a character which ordinarily it was the purpose of the judiciary act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals." * * *
>
> "We do not think we are called upon to scrutinize the entire record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusions of the Courts below, as to the tendencies of the proof."

Chicago, R. I. & Pac. Ry. vs. Brown, Supra, this Court said:

> "The trial Court and the Circuit Court of Appeals considering the evidence confirmed the finding of the jury expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed but such as must be pronounced to be without foundation as a matter of law."

G. N. Ry. Co. vs. Knapp Supra. This Court said the question presented:

> "simply involves an appreciation of all the facts and the admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The State Courts—Trial and Appellate, held that there were. Having regard to the appropriate exercise of the judisdiction of this Court, we should not disturb the decision on a question of this sort unless error is palpable."

Southern Ry. Co. vs. Gadd, Supra. This Court said:

> "The questions that require to be decided merely involve considerations of general law depending in no sense upon the particular significance of the employers liability act. * * * Under these considerations it is apparent that the case is absolutely controlled by the 'King case,' and we therefore content ourselves with saying that as after an adequate examination of the record we find no ground whatever, affording a clear conviction that error was committed."

Baltimore & Chi. R. R. Co., vs. Whitacre, Supra, this Court said:

> "The defendant requested peremptory instruction on the ground that there was not sufficient evidence to entitle plaintiff to recover. The Appellate Court was unanimous in holding that the trial Court had properly left the case to the jury. No clear and palpa-

ble error is shown which would justify us in disturbing that ruling."

Lewisville & Nashville Ry. Co. vs. Stewart, Supra, this Court said:

> "The railroad company contends at some length that the case should have been taken from the jury by a direction of a verdict in its favor. As the opinion of both Courts below, and the jury were against it, and as we agree with their judgment, we should not discuss this assignment of error at length. * * * Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong."

When we consider that this was a unanimous and not a Five-Sixths verdict, that after due consideration of the evidence and the law, not only at the close of the testimony but also on a motion for judgment non obstante, the verdict was approvided by the trial Court, and that on appeal the action of the trial Court was affirmed by the unanimous vote of the Appellate Court, also;

That not a Federal case cited by Petitioner on its facts is in point or authority in this case. That the rule as expressed by this Court in this class of cases, is found in Myers vs. Pittsburg Coal Company, 233 U. S. 184, and similar cases, and not in Pittsburg Coal Company vs. Myers, 203 Fed. 221, and the further fact that the rule in the "King case" consistently followed by this Court is applic-

able to the situation in this case. It would seem that but one conclusion could be reached, and that is that the petition for the Writ of Certiorari is not in good faith; that it is without merit and for delay only.

We therefore, respectfully submit that the petition for Writ of Certiorari should be denied with a penalty by way of damages under the rules of this Court, together with legal interest and costs.

Respectfully submitted,

LYLE PETTIJOHN,
427 Metropolitan Bank Bldg.,
St. Paul, Minnesota,
Attorney for Respondent.
T. D. SHEEHAN,
H. J. GOODWIN,
Metropolitan Bank Bldg.,
St. Paul, Minnesota,
Of Counsel for Respondent.